STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 18, 2004
v	No. 245795 Saginaw Circuit Court
NITA LADELL BALDWIN, Defendant-Appellant.	LC No. 02-021247-FH

Before: Jansen, P.J., and Markey and Gage, JJ.

PER CURIAM.

Defendant appeals by right her jury conviction of operating a motor vehicle while under the influence, causing death, MCL 257.625(4). Defendant was sentenced as a third habitual offender, MCL 769.12, to 7 to 25 years' imprisonment. We affirm.

First, defendant argues the trial court erred in dismissing a juror during trial without establishing the juror's prejudice or bias toward a party. We disagree. We review a trial court's decision to excuse a juror during trial for an abuse of discretion. *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001).

MCL 768.18 provides, in part:

> Should any condition arise during the trial of the cause which in the opinion of the trial court justifies the excusal of any of the jurors so impaneled from further service, he may do so and the trial shall proceed, unless the number of jurors be reduced to less than 12.

In this case, the trial court excused a juror who arrived late for trial and then approached defense counsel and spoke to him, contrary to the court's instructions. When the trial court questioned him about the conversation, the juror indicated his desire to give defendant a fair trial. He did not mention a similar obligation of fairness toward the prosecution. Also, the juror's removal did not result in a jury of less than twelve. Therefore, the trial court did not abuse its discretion in excusing the juror.

Next, defendant asserts the trial court erred in admitting statements the deceased passenger made to a paramedic at the accident scene regarding the deceased's and defendant's

alcohol and cocaine use before the accident. We disagree. A trial court's decision to admit evidence will not be disturbed on appeal absent a clear abuse of discretion. *People v Starr,* 457 Mich 490, 494; 577 NW2d 673 (1998).

A hearsay statement is an out-of-court statement offered to prove the truth of the matter asserted. MRE 801(c). Hearsay statements are inadmissible unless they fall under a specific exception provided by the rules of evidence. MRE 802. One exception is for excited utterances: "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." MRE 803(2). For a statement to be admitted as an excited utterance it must (1) arise out of an occasion sufficiently startling to render the statement spontaneous and unreflecting, (2) be made before there has been time to contrive and misrepresent, and (3) relate to the circumstances of the startling occasion. *People v Straight*, 430 Mich 418, 424; 424 NW2d 257 (1988), citing *People v Gee*, 406 Mich 279, 282: 278 NW2d 304 (1979).

Defendant first contends the deceased's statements were not spontaneous. The pertinent inquiry in determining whether a statement was an excited utterance is not whether there was time for the declarant to fabricate a statement, but whether the declarant was so overwhelmed that he lacked the capacity to fabricate. *People v Smith,* 456 Mich 543, 551-552; 581 NW2d 654 (1998). Here, the deceased made the statements approximately fifteen minutes after the accident and while he was in pain from his injuries. Viewing the circumstances of the paramedic's questioning, the deceased's statement regarding his and defendant's substance use appears to have been spontaneous rather than the result of reflective thought. *Id*. at 553, quoting McCormick, Evidence (3d ed), § 297, p 857.

Defendant also argues the statements did not relate to the startling event, i.e., the accident, but rather to events that occurred before the startling event. We again disagree. Defendant's alcohol and drug use before the accident relates to the circumstances of the startling occasion. Therefore, the trial court did not err in admitting the statements.

Finally, defendant contends the trial court erred in admitting blood and urine test results where the prosecution did not establish a foundation for their admission. We disagree. We review a trial court's decision to admit evidence for a clear abuse of discretion. *Starr, supra* at 494. Because defendant here failed to preserve this issue, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

MCL 257.625a(6)(a) addresses the admission of blood and urine test results at trial:

> The amount of alcohol or presence of a controlled substance or both in a driver's blood or urine or the amount of alcohol in a person's breath at the time alleged as shown by chemical analysis of the person's blood, urine, or breath is admissible into evidence in any civil or criminal proceeding and is presumed to be the same as at the time the person operated the vehicle.

Additionally, subsection (e) concerns the admission of results of blood tests administered on a driver following an accident:

> (e) If, after an accident, the driver of a vehicle involved in the accident is transported to a medical facility and a sample of the driver's blood is withdrawn at that time for medical treatment, the results of a chemical analysis of that sample are admissible in any civil or criminal proceeding to show the amount of alcohol or presence of a controlled substance or both in the person's blood at the time alleged, regardless of whether the person had been offered or had refused a chemical test. The medical facility or person performing the chemical analysis shall disclose the results of the analysis to a prosecuting attorney who requests the results for use in a criminal prosecution as provided in this subdivision. A medical facility or person disclosing information in compliance with this subsection is not civilly or criminally liable for making the disclosure. [MCL 257.625a(6)(e).]

Blood and urine test results are admissible if they are relevant and reliable. *People v Fosnaugh*, 248 Mich App 444, 450; 639 NW2d 587 (2001); *People v Campbell*, 236 Mich App 490, 503, 506; 601 NW2d 114 (1999).

Test results showing the presence of alcohol and cocaine in defendant's blood and urine were relevant because they were evidence of whether defendant was "under the influence of intoxicating liquor," or had "an alcohol content of 0.10 grams or more per 100 milliliters of blood" while driving. MCL 257.625(1). Further, defendant did not demonstrate this probative value was substantially outweighed by the "danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403.

Finally, defendant has not established that hospital procedures rendered the test results unreliable. *Fosnaugh, supra* at 450. Therefore, defendant has not established that plain error affected her substantial rights. *Carines, supra* at 763.

We affirm.

/s/ Kathleen Jansen
/s/ Jane E. Markey
/s/ Hilda R. Gage